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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 36

[FAC 2005-88; FAR Case 2015-018; Item IV; Docket No. 2015-0018; Sequence No 1]

RIN 9000-AN10

Federal Acquisition Regulation; Improvement in Design-Build Construction Process

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement section 814 of the Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2015 that requires the head of the contracting activity to approve any determinations to select more than five offerors to submit phase-two proposals for a two-phase design-build construction acquisition that is valued at greater than \$4 million.

DATES: Effective: **[Insert date 30 days after date of publication in the FEDERAL REGISTER].**

FOR FURTHER INFORMATION CONTACT: Mr. Curtis E. Glover, Sr., Procurement Analyst, at 202-501-1448, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755. Please cite FAC 2005-88, FAR Case 2015-018.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule in the Federal Register at 80 FR 60833 on October 8, 2015, to implement section 814 of the Carl Levin and Howard P. 'Buck' McKeon NDAA for FY 2015, Public Law 113-291. Section 814 requires the head of the contracting activity, delegable to a level no lower than the senior contracting official, to approve any determinations to select more than five offerors to submit phase-two proposals for a two-phase design-build construction acquisition that is valued at greater than \$4 million. Five respondents submitted comments on the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. One change was made to the rule as a result of

those comments. A discussion of the comments is provided as follows:

Comment: One respondent requested that the maximum number of offerors allowed to submit phase-two proposals be limited to three of the most highly qualified offerors.

Response: The scope of this rule is limited to the implementation of Section 814 of the FY 2015 NDAA, which requires a higher approval authority when selecting more than five offerors to participate in Phase 2 of a design-build acquisition. Identifying the ideal number of contractors for participation in Phase 2 is beyond the scope of the case and the statute that is being implemented.

Comment: Two respondents recommended that the rule be revised to add a reporting requirement for those instances when more than five offerors are selected to submit phase-two proposals.

Response: The scope of this rule is limited to the implementation of Section 814 of the FY 2015 NDAA. Adding a public reporting requirement is beyond the scope of the case and the statute that is being implemented.

Comment: One respondent recommended that the rule be revised to include a requirement that the senior

contracting official's approval be documented in the contract file.

Response: The requirement to document the contract file was in the proposed rule at FAR 36.303-1(a)(4). In civilian agencies, for paragraph (a)(4) of FAR section 36.303-1, the senior contracting official is the advocate for competition for the procuring activity, unless the agency designates a different position in agency procedures. The approval shall be documented in the contract file.

Comment: One respondent recommended that the FAR be revised to limit the use of single-step design-build procurements by requiring the use of two-step design-build procurement process for all design-build procurements above \$4 million.

Response: The recommendation is beyond the scope of the case and the statute that is being implemented.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity).

E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

This rule implements section 814 of the Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015. Section 814 is entitled Improvement in Defense Design-Build Construction Process. Section 814 requires the head of the contracting activity, delegable to a level no lower than the senior contracting official, to approve any determinations to select more than five offerors to submit phase-two proposals for a two-phase design-build construction acquisition that is valued at greater than \$4 million.

No comments were received by the public comments in response to the initial regulatory flexibility analysis. The number of design-build construction awards is not currently tracked by the Federal government's business systems. In Fiscal Year 2014, the Federal Government awarded 3,666 construction awards to 2,239 unique small business vendors. It is unknown what percentage of these contracts involved design-build construction services.

This rule does not impose new recordkeeping or reporting requirements. The new approval requirement for advancing more than five contractors to phase two of a two-phase design-build selection procedure only affects the internal operating procedures of the

Government. For acquisitions valued over \$4 million, the head of the contracting activity (HCA) is required to now make a determination that it is in the best interest of the Government to select more than five offerors to proceed to phase two. Any burden caused by this rule is expected to be minimal and will not be any greater on small businesses than it is on large businesses.

No alternative approaches were considered. The new approval requirement for advancing more than five contractors to phase two of a two-phase design-build selection procedure only affects the internal operating procedures of the Government. It is not anticipated that the proposed rule will have a significant economic impact on small entities.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

V. Paperwork Reduction Act

The final rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subject in 48 CFR Part 36

Government procurement.

Dated: May 5, 2016.

William Clark,
Director,
Office of Government-wide
Acquisition Policy,

Office of Acquisition Policy,
Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR part 36 as set forth below:

PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

1. The authority citation for 48 CFR part 36 continues to read as follows:

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

2. Amend section 36.303-1 by revising paragraph (a)(4) to read as follows:

36.303-1 Phase One.

(a) * * *

(4) A statement of the maximum number of offerors that will be selected to submit phase-two proposals. The maximum number specified in the solicitation shall not exceed five unless the contracting officer determines, for that particular solicitation, that a number greater than five is in the Government's interest and is consistent with the purposes and objectives of the two-phase design-build selection procedures. The contracting officer shall document this determination in the contract file. For acquisitions greater than \$4 million, the determination shall be approved by the head of the contracting activity, delegable to a level no lower than the senior contracting official within the contracting activity. In civilian

agencies, for this paragraph (a)(4), the senior contracting official is the advocate for competition for the procuring activity, unless the agency designates a different position in agency procedures. The approval shall be documented in the contract file.

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